

## ***Plessy, Brown* and HBCUs: On the Imposition of Stigma and the Court's Mechanical Equal Protection Jurisprudence**

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### I. INTRODUCTION

In *Brown v. Board of Education*,<sup>1</sup> the Supreme Court held that racial segregation in public schools was unconstitutional. The Court overruled *Plessy v. Ferguson*<sup>2</sup> on an empirical matter concerning human psychology, seeming to emphasize the constitutional importance of determining whether the state's actions were stigmatizing.<sup>3</sup> More recently, the Court has eschewed examination of the matter in dispute between the *Plessy* and *Brown* Courts, yielding a more mechanical equal protection jurisprudence that may result in exactly the kinds of effects the *Brown* Court sought to avoid.

Recent Court decisions suggest that the constitutionality of Historically Black Colleges and Universities (HBCUs) is in doubt, although two members of the majority that has been dismantling the Court's equal protection jurisprudence have signaled that they see no constitutional difficulty posed by HBCUs. Their defection from the jurisprudence they seek to create is welcome. What would be even more welcome is the recognition of the bankruptcy of the approach that they have been espousing. Until that occurs, the Court's credibility on issues of race will continue to erode.

Part II of this Article compares *Plessy v. Ferguson* with *Brown v. Board of Education*, discussing the two features emphasized by the *Brown* Court in distinguishing what was at issue there from what was at issue in *Plessy*. Part III discusses the implications of the Court's current equal protection jurisprudence for HBCUs, suggesting both that the constitutionality of their continued existence is in doubt given the Court's current jurisprudence and that this result helps illustrate why the Court's current position is flawed. The Article concludes that even

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1. 347 U.S. 483 (1954).

2. 163 U.S. 537 (1896).

3. See *Brown*, 347 U.S. at 494-95.

were the Court to uphold the constitutionality of HBCUs, confidence in the Court's fairness would nonetheless continue to decline unless the Court reversed course and developed a more nuanced equal protection analysis.

## II. *PLESSY VS. BROWN*

In *Brown v. Board of Education*, the Court concluded that “in the field of public education the doctrine of ‘separate but equal’ has no place,”<sup>4</sup> since “[s]eparate educational facilities are inherently unequal.”<sup>5</sup> Appreciating that such a holding seemed to contradict the position articulated about sixty years earlier in *Plessy v. Ferguson*,<sup>6</sup> the *Brown* Court offered two different justifications for the apparent change in view: (1) *Plessy* finding to the contrary notwithstanding, segregation imposes psychological harms, and (2) education involves such an important interest that segregation in the public schools cannot be permitted even if it somehow could be permitted in other areas of life.<sup>7</sup>

In *Plessy*, the Court addressed a requirement that blacks and whites be separate in railway cars. The plaintiffs argued that the “enforced separation of the two races stamps the colored race with a badge of inferiority,”<sup>8</sup> but the Court rejected that contention, suggesting that any feelings of inferiority would not be “by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”<sup>9</sup> Thus, the *Plessy* Court denied that the separation of the races was inherently stigmatizing and also denied that a state was violating the Equal Protection Clause of the Fourteenth Amendment by virtue of its employing an express racial classification.

The *Brown* Court considered *Plessy*'s psychological analysis and concluded, “[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, [the *Brown* Court's finding of harm caused by segregation] . . . is amply supported by modern authority,”<sup>10</sup> and then held that any “language in *Plessy v. Ferguson* contrary to this finding is rejected.”<sup>11</sup>

The *Brown* Court suggested that to separate “children in grade and high schools . . . from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way

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4. *Brown*, 347 U.S. at 495.

5. *Id.*

6. 163 U.S. 537 (1896).

7. See notes 18-24 and accompanying text *infra*.

8. *Plessy*, 163 U.S. at 551.

9. *Id.*

10. *Brown*, 347 U.S. at 494.

11. *Id.* at 494-95.

unlikely ever to be undone.”<sup>12</sup> By focusing on the effects on *children*, who are too young to be accused of imposing disingenuous constructions on “neutral” state actions, the *Brown* Court was able to undercut the *Plessy* denial that segregation was stigmatizing and also undercut the implicit *Plessy* suggestion that the plaintiffs who so construed segregation laws did so just to gain an advantage in litigation. Indeed, one might infer from reading the *Brown* opinion that the Court believed *Plessy* would have been decided differently if only the psychological implications of segregation had been adequately understood.

It might seem surprising that the *Brown* Court would describe segregated schools as *inherently* unequal, if indeed the Court was basing its decision on an empirical judgment regarding segregation’s psychological effects on particular individuals, in a particular society, at a particular time. Stating that something is inherently unequal seems to be a more categorical claim<sup>13</sup> than that state-mandated segregation in a particular context would have undesirable effects or, perhaps, that it would be understood in a particular way because of background cultural understandings.<sup>14</sup> The claim of inherent inequality seems to imply that even absent those undesirable effects segregation would still be impermissible.

Yet, the Court’s claim about the inherent inequality of segregation need not be understood as so categorical. The Court might have been suggesting that given the social context in which racial segregation was being imposed, its imposition was inherently unequal because, as Professor Amar suggests, the “purpose and effect and social meaning of racial segregation in America in 1954 [was] to create two hereditary classes of citizens.”<sup>15</sup> The *Brown* Court might not have been committing itself to decide whether racial segregation would be permissible in public schools in “some parallel universe where blacks as well as whites truly wanted separation, where no stigma attached to separation, where separation was not simply a way of keeping blacks down.”<sup>16</sup> Indeed, one issue that seems to distinguish the *Brown* Court from the current Court

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12. *Id.* at 494.

13. See Richard Cummings, *All-Male Black Schools: Equal Protection, the New Separatism and Brown v. Board of Education*, 20 HASTINGS CONST. L.Q. 725, 728-29 (1993) (“Something that is ‘inherently unequal’ is not so because of empirical data, but because of its very nature, known through pure reason.”).

14. For an analysis suggesting that cultural understandings should form part of the basis for deciding the level of scrutiny to be employed by the Court, see generally Charles R. Lawrence III, *The Id, The Ego, And Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

15. See Akhil Reed Amar, *Becoming Lawyers in the Shadow of Brown*, 40 WASHBURN L.J. 1 (2000).

16. See *id.* at 8.

is whether the imposition of stigma is even relevant in determining the constitutionality of an express racial classification by the state.<sup>17</sup>

As suggested above, one way to distinguish between the *Brown* and *Plessy* decisions is in terms of their analyses regarding whether state-imposed segregation is stigmatizing. Yet, that is by no means the only way to distinguish between them. The *Brown* Court noted that *Plessy* involved “not education but transportation,”<sup>18</sup> implying that this difference was constitutionally significant. Indeed, the Court spent some time discussing the importance of education, noting that it “is perhaps the most important function of state and local governments,”<sup>19</sup> since it “is required in the performance of our most basic public responsibilities,”<sup>20</sup> is “the very foundation of good citizenship,”<sup>21</sup> and is a “principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”<sup>22</sup> The Court summed up its view of the importance of education by stating that “[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”<sup>23</sup> The *Brown* Court seemed to imply that even if one could succeed in life notwithstanding one’s having to ride separately in railway cars,<sup>24</sup> one likely would not be able to succeed if one were forced to attend separate schools. So the segregation at issue in *Brown*, was even more invidious than the segregation at issue in *Plessy* and, thus, segregation in schools could not withstand constitutional scrutiny even if segregation in railway cars somehow could.<sup>25</sup>

The *Brown* Court stated that the “doctrine of ‘separate but equal’ did not make its appearance in this court until 1896 in the case of *Plessy v. Ferguson*,”<sup>26</sup> and that although “there ha[d] been six cases involving the ‘separate but equal’ doctrine in the field of public education . . . , the

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17. Sometimes, the Court seems to be suggesting that it will not permit racial classifications because they carry the risk of imposing stigmatic harm. See text accompanying note 148 *infra*. But see text accompanying note 66 *infra* in which Justice Thomas argues that race-based classifications are impermissible whether or not stigmatizing.

18. *Brown v. Bd. of Educ.*, 347 U.S. 483, 491 (1954).

19. *Id.* at 493.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. The *Brown* Court refused to overrule *Plessy*, instead seeming to opt for a more gradualist approach to dismantling segregation. See Robert A. Burt, *Wrong Tomorrow, Wrong Yesterday, But Not Wrong Today: On Sliding into Evil with Zeal but Without Understanding*, 5 ROGER WILLIAMS U. L. REV. 19, 39 (1999) (discussing the *Brown* Court’s “attitude toward race segregation in the first *Brown* decision, proclaiming clear moral condemnation, coupled with its commitment in the second *Brown* decision to gradual, rather than instantaneous, abolition.”).

25. See notes 18-24 *supra*.

26. *Brown*, 347 U.S. at 490-91.

validity of the doctrine itself [had] not [been] challenged.”<sup>27</sup> The Court thereby implied that the doctrine might have been overturned if only it had been challenged earlier or, at the very least, that this was a matter of first impression and, thus, the Court was working with a clean slate. The Court’s claim, although literally true, was somewhat misleading.

In *Gong Lum v. Rice*,<sup>28</sup> the Court addressed whether “a state can be said to afford to a child of Chinese ancestry, born in this country and a citizen of the United States, the equal protection of the laws, by giving her the opportunity for a common school education in a school which receives only colored children of the brown, yellow, or black races.”<sup>29</sup> The Court noted that the “right and power of the state to regulate the method of providing for the education of its youth at public expense is clear,”<sup>30</sup> and then affirmed<sup>31</sup> the Supreme Court of Mississippi having upheld a provision of the state constitution that had “divided the educable children into those of the pure white or Caucasian race, on the one hand, and the brown, yellow, and black races, on the other.”<sup>32</sup> Thus, the *Gong Lum* Court addressed whether equal protection guarantees were violated by such a system,<sup>33</sup> notwithstanding that the validity of the separate but equal doctrine had not been challenged by the plaintiff.<sup>34</sup>

*Gong Lum* argued that his daughter, Martha, had a constitutional right to attend a white consolidated school—thus, he was challenging the application rather than the validity of the state’s separate but equal doctrine.<sup>35</sup> Yet, in upholding the state’s application of its doctrine, the Court upheld the state’s choosing for itself how to educate its own children,<sup>36</sup> thereby suggesting that the Federal Constitution was not violated by a state implementing a separate but equal doctrine in public education. Further, the *Gong Lum* Court suggested that to meet the equality criterion of “separate but equal” the system only had to provide the same curriculum and the same number of months of school term.<sup>37</sup> Some of the other indicia of equality suggested in *Brown*, e.g., buildings, transportation, and educational qualifications of teachers,<sup>38</sup> were not

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27. *Id.* at 491.

28. 275 U.S. 78, 85 (1927).

29. *Id.*

30. *Id.*

31. *See id.* at 87.

32. *Id.* at 82.

33. *See id.* at 85.

34. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 491 (1954).

35. *Gong Lum*, 275 U.S. at 81.

36. *See id.* at 85.

37. *Id.* at 84.

38. *See Brown*, 347 U.S. at 486 n. 1. *See also Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (discussing “those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.”).

even considered.

The *Gong Lum* Court cited a case decided shortly after *Plessy*<sup>39</sup> for support— *Cumming v. Richmond County Board of Education*<sup>40</sup>—which was described in *Brown* as another case not challenging the validity of the separate but equal doctrine.<sup>41</sup> Again, the *Brown* Court’s description was technically accurate but somewhat misleading. As the *Gong Lum* Court explained, in *Cumming* “persons of color sued the board of education to enjoin it from maintaining a high school for white children without providing a similar school for colored children, which had existed and had been discontinued.”<sup>42</sup> Thus, *Cumming* also did not address the validity of the separate but equal doctrine, since in that case there were not even separate and unequal schools but, rather, high schools for white children and no high schools for black children.

In *Cumming*, plaintiffs challenged the portion of their taxes going to “the support of a system of high schools in which the colored school population of the county were not given the same educational facilities as were furnished the white school population.”<sup>43</sup> On first reading, this might seem to involve a challenge to the separate but equal doctrine, since the plaintiffs argued that the Constitution prohibited the state from affording the white school population facilities which were not also afforded the black school population. Further support for such a reading might seem to be provided by the opinion itself, since the *Cumming* Court noted that it had been said at “argument that the vice in the common-school system of Georgia was the requirement that the white and colored children of the state be educated in separate schools.”<sup>44</sup>

Nonetheless, the Court made clear that it would not explicitly address the validity of the separate but equal doctrine, since no objection to separate schooling had been made in the pleadings<sup>45</sup> and the plaintiffs had offered “no objection to the tax in question so far as levied for the support of primary, intermediate, and grammar schools, in the management of which the rule as to the separation of races is enforced.”<sup>46</sup> Thus, the Court did not feel the need to address the separate but equal doctrine, ostensibly because separate schooling provided for the younger children had not been challenged.

While the Court did not specifically address that doctrine, however,

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39. *Cumming* was decided three years after *Plessy*.

40. 175 U.S. 528 (1899).

41. *See Brown*, 347 U.S. at 491.

42. *Gong Lum v. Rice*, 275 U.S. 78, 85 (1927).

43. *Cumming*, 175 U.S. at 529.

44. *Id.* at 543.

45. *See id.*

46. *Id.* at 543-44.

the Court nonetheless implicitly gave that doctrine its approval, since the plaintiffs were unsuccessful in challenging something even more egregious. Thus, rather than suggest that the separate but equal doctrine violated equal protection guarantees, the *Cumming* plaintiffs offered a less ambitious but seemingly even more unassailable argument, namely, that the Board of Education was constitutionally prohibited from levying taxes to support high schools for white children when there were no high schools for black children.<sup>47</sup>

The *Cumming* Court did not construe the Board of Education's choice as a decision to provide white but not black children with a high school education but, instead, as a decision about "whether [the Board] should maintain, under its control, a high school for about 60 colored children or withhold the benefits of education in primary schools from 300 children of the same race."<sup>48</sup> The Court accepted the Board's claim that it "was impossible . . . to give educational facilities to the 300 colored children who were unprovided for, if it maintained a separate school for the 60 children who wished to have a high-school education,"<sup>49</sup> and decided that the Board's decision was "in the interest of the greater number of colored children, leaving the smaller number to obtain a high-school education in existing private institutions."<sup>50</sup> Rather than analyze the relevant choice as involving who would have access to public high schools,<sup>51</sup> the Court instead analyzed it in terms of which and how many black children would have access to public schooling in general.

Given *Gong Lum* and *Cumming*, the *Brown* Court would have given a more complete picture had it suggested that equal protection jurisprudence had gradually been evolving and that the jurisprudence suggested in *Cumming* and *Gong Lum* was now disfavored. As the *Brown* Court pointed out, in several "more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications,"<sup>52</sup> which was a far cry from the Court's suggestion earlier in the century that it was constitutionally permissible for a state to have high schools for white children even if it did not have

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47. See *id.* at 529.

48. *Id.* at 544.

49. *Id.*

50. *Id.*

51. See John E. Nowak, Essay, *The Gang of Five & the Second Coming of an Anti-Reconstruction Supreme Court*, 75 NOTRE DAME L. REV. 1091, 1106 (2000) ("While pretending to create a separate but equal doctrine, the Court upheld the provision of education to white students only when a local school board claimed that it could not afford to operate a high school for black students as well as white students.").

52. *Brown v. Bd. of Educ.*, 347 U.S. 483, 491-92 (1954).

high schools for black children.<sup>53</sup>

By pointing out that the separate but equal doctrine had not been challenged in the context of public education in particular, the *Brown* Court implied that the issue had never been addressed before, and that its decision, which was based in part on the importance of the interest at stake,<sup>54</sup> might well have been reached by the Court decades earlier if only the separate but equal doctrine in public education had been squarely before the Court.<sup>55</sup> The Court failed to note that education itself was viewed as more important in the fifties than it had been previously. For example, in *Buchanan v. Warley*,<sup>56</sup> which was decided about twenty years after *Plessy* and forty years before *Brown*, the Court noted that “this court has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and courts of high authority have held enactments lawful which provide for separation in the public schools of white and colored pupils where equal privileges are given.”<sup>57</sup> The *Buchanan* Court implied that those kinds of segregation were permissible,<sup>58</sup> unlike what was at issue before the Court in *Buchanan*, namely, an ordinance making it unlawful for:

[A]ny colored person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly any house upon any block upon which a greater number of houses are occupied as residences, places of abode, or places of public assembly by white people than are occupied by residences, places of abode, or places of public assembly by colored people.<sup>59</sup>

Thus, the *Buchanan* Court suggested that a state could prevent integration in schools, but could not prevent individuals from selling property to individuals of other races. Yet, if twenty years after *Plessy*, state laws prohibiting integration in schools were viewed as constitutional even if state laws prohibiting housing integration were not because the latter interfered with freedom of contract and, especially, if three years after *Plessy* states were allowed to provide a public high school education for white and not for black children. It seems at best implausible for the *Brown* Court to have suggested that *Plessy* would have been decided differently had it been about schools rather than

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53. This is how the *Gong Lum* Court read *Cumming*. See *Gong Lum v. Rice*, 275 U.S. 78, 85 (1927).

54. See notes 39-51 and accompanying text *supra*.

55. The *Brown* Court noted that *Plessy* involved “not education but transportation,” *Brown*, 347 U.S. at 491, and that education is “perhaps the most important function of state and local governments.” *Id.* at 493.

56. 245 U.S. 60 (1917).

57. *Id.* at 81.

58. See *id.*

59. *Id.* at 70-71.

railway cars.<sup>60</sup>

The point here of course is not to suggest that *Brown* was wrongly decided, but merely that *Brown* was wrong to suggest that *Plessy* would likely have been decided differently even with a different understanding of psychology or even if the issue at hand had involved schools rather than railway cars. The *Brown* Court should instead have admitted that there had been a change in the evolving jurisprudence that required striking down the education practices at issue. That point notwithstanding, the *Brown* decision was courageous and an important step along the road to promoting racial healing in this country.

### III. HBCUS AND EQUAL PROTECTION

*Brown* suggests that the separation of the races in public schools might result in harms that could never be undone.<sup>61</sup> Yet, it is not immediately clear whether *Brown* is suggesting that: (1) segregation in schools is inherently harmful even if, for example, it is done without the state's imprimatur, or (2) the state mandating segregation in the schools is what makes this harmful, or (3) the state mandating segregation in any context is harmful. Courts and commentators disagree about what the *Brown* Court in particular was suggesting and about what should be the current policies in the schools and elsewhere.

Some commentators read *Brown* to be downplaying the importance of who is doing the discriminating,<sup>62</sup> i.e., to be suggesting that segregation in the schools is stigmatizing whether or not it has been mandated by the state.<sup>63</sup> Richard Cummings argues that "*Brown* taught

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60. It is possible, but extremely unlikely that *Cumming* would have been decided differently had *Plessy* not existed as a precedent. Thus, the existence of *Cumming* does not establish, but strongly suggests that *Plessy* would not have been decided differently.

61. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). See also Frank Adams, Jr., *Why Brown v. Board of Education and Affirmative Action Can Save Historically Black Colleges and Universities*, 47 ALA. L. REV. 481, 490 (1996).

The *Brown* Court did not indicate that single-race schools which do not discriminate in their admissions policies could never be legal . . . [but] merely held that legally mandated racial segregation in public primary and secondary schools cannot result in an equal education under the law because such a situation stigmatizes students belonging to the minority racial group.

*Id.* See also Pamela J. Smith, Comment, *All-Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003, 2009 (1992) ("*Brown* stood for the proposition that segregation by race—separation that 'branded a whole group inferior'—was no longer lawful.>").

62. See Cummings, *supra* note 13, at 726 ("Specifically, even if racial segregation of blacks is voluntary, as it is in AMBSs [all-male black schools], it is still harmful. The 'sanction of the law' standard of *Brown* can be eliminated with its holding still intact."). Cf. Murray Dry, *Brown v. Board of Education at Forty: Where Are We? Where Do We Go From Here?* 1 RACE AND ETHNIC ANCESTRY L. DIG. 8, 11 (1995) (suggesting that the *Brown* "opinion's emphasis on equal educational opportunity and its implicit endorsement of the view that racial separation is harmful to the minority even without the sanction of law, allowing one to argue that the constitutional mandate must be integrated public schools.>").

63. *But see* *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) (Thomas, J., concurring) ("Segregation was not unconstitutional because it might have caused psychological feelings of inferiority.>").

us, in essence, that blacks needed to be integrated into white schools and that the Constitution required it.”<sup>64</sup> However, others offer a different view. For example, Justice Thomas in his *Jenkins* concurrence suggests that *Brown* did not say that “racially isolated” schools were inherently inferior; the harm that it identified was tied purely to de jure segregation, not de facto segregation.<sup>65</sup>

While Justice Thomas is correct that the *Brown* Court was addressing de jure segregation, he is somewhat misleading about what the Court said. The Court looked at empirical studies concerning the psychological effects of the current state-sponsored discrimination and concluded that such discrimination had harmful effects. The Court did not address whether school segregation that had not been state-mandated would also have such effects, since that was not at issue. What is very clear, however, is that *Brown* would have been a much different opinion had it adopted the tack offered by Justice Thomas, who suggested that the *Brown* Court “did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental, truth that the government cannot discriminate among its citizens on the basis of race.”<sup>66</sup> Had that been the Court’s view, (1) *Brown* would presumably have said that *Plessy* was wrongly decided even if correct that state-mandated racial separation in schools was not stigmatizing, since the issue would not have been whether the segregation was stigmatizing but, instead, whether it was state-mandated, and (2) schools and programs which, for example, were started initially to further segregative goals might not be allowed to continue, even if they did not stigmatize any group.<sup>67</sup>

Justice Thomas argues that “[r]acial isolation’ itself is not a harm; only state-enforced segregation is.”<sup>68</sup> Indeed, he suggests that those arguing that integration “is the only way that blacks can receive a proper education [are suggesting that] . . . there must be something inferior about blacks,”<sup>69</sup> since those theorists are allegedly suggesting that “segregation injures blacks because blacks, when left on their own, cannot achieve,” which, he concludes, is “a jurisprudence based upon a

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64. Cummings, *supra* note 13, at 747.

65. See *Jenkins*, 515 U.S. at 116 (Thomas, J., concurring). See also Pamela J. Smith, Comment, *All-Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003, 2014 (1992) (“When the Court spoke in *Brown* of the inherent inequality of separation, it did not mean that African-American children could not obtain a quality education without the presence of white children. *Brown* stated only that state-mandated racial separation conferred a sense of inferiority on African-American children.”).

66. *Jenkins*, 515 U.S. at 116 (Thomas, J., concurring).

67. See notes 133-135 and accompanying text *infra* (suggesting that this seems close to Justice O’Connor’s view).

68. *Jenkins*, 515 U.S. at 122 (Thomas, J., concurring).

69. *Id.* (Thomas, J., concurring).

theory of black inferiority.”<sup>70</sup>

Yet, Justice Thomas’ account of the integrationist position does not do it justice, since those touting the benefits of integration suggest that all groups will thereby be benefited.<sup>71</sup> Thus, the claim is not that segregation injures blacks because they cannot achieve on their own, but that students of all races will miss something important if their classrooms are all homogeneous.<sup>72</sup>

Certainly, it is fair to suggest that integration alone will not guarantee optimal educations for all parties. If, for example, the burdens of achieving integration are imposed more heavily on one racial group than another and if teachers or administrators disfavor that racial group, then of course the educational experience of that group will suffer.<sup>73</sup> The fact that these burdens would diminish the value of the education, however, would not undercut the benefits of an integrated classroom where those disparities were not present.<sup>74</sup>

The point here is not to underestimate the difficulties in providing a quality education for all parties regardless of race. As Justice Blackmun has suggested, however, “an integrated school system is no less desirable because it is difficult to achieve,”<sup>75</sup> although the Court does not appear to embrace that position.<sup>76</sup>

In *Freeman v. Pitts*,<sup>77</sup> the Court recognized that “the potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of de jure segregation have been eliminated.”<sup>78</sup> The Court recognized that “[p]ast wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history,”<sup>79</sup> and noted that “stubborn

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70. *Id.* (Thomas, J., concurring).

71. See Cummings, *supra* note 13 (discussing studies indicating that both blacks and whites were harmed by segregation).

72. See Lisa M. Fairfax, *The Silent Resurrection of Plessy: The Supreme Court’s Acquiescence in the Resegregation of America’s Schools*, 9 TEMP. POL. & CIV. RTS. L. REV. 1, 49 (1999) (“One important value imparted by mixed schooling is the importance of a racially mixed society. It must be difficult for school officials to teach this value while sanctioning separate schools.”).

73. See *id.* at 50 (“Black children often bear most of the burdens of busing and their educational skills suffer when they are in environments in which they are not valued by their teachers and administrators.”). See also Sonia R. Jarvis, Essay, *Brown and the Afrocentric Curriculum*, 101 YALE L. J. 1285, 1286 (1992) (“[W]hile some Black children benefit from attending school with white children, others lose confidence and actually perform more poorly because of discriminatory tracking programs and teachers’ negative attitudes toward black children.”).

74. See Fairfax, *supra* note 72, at 50 (“[R]esearchers have also found that when done correctly integration provides the best learning environment for all students by increasing their achievement scores and their long-term probability of success”). See also Joshua E. Kimerling, *Black Male Academics: Re-Examining the Strategy of Integration*, 42 BUFF. L. REV. 829, 849 (1994) (“The most recent and extensive study of the status of blacks concluded that educational attainment rises with integration.”).

75. *Freeman v. Pitts*, 503 U.S. 467, 518 (1992) (Blackmun, J., concurring).

76. See notes 104-107 and accompanying text *infra*.

77. 503 U.S. 467 (1992).

78. *Id.* at 489.

79. *Id.* at 495.

facts of history linger and persist.”<sup>80</sup> Yet, after pointing out the persistence of these stubborn facts, the Court immediately distanced itself from the implications that might be thought to spring from that persistence, immediately cautioning that the Court must not “overstate its consequences in fixing legal responsibilities.”<sup>81</sup> The Court made clear that the “vestiges of segregation that are the concern of the law in a school case . . . must be so real that they have a causal link to the de jure violation being remedied.”<sup>82</sup> However, if the cause of segregation is not linked to the de jure violation, then it is beyond the reach of the law.

The Court has noted the “high correlation between residential segregation and school segregation,”<sup>83</sup> but also has noted that it “is simply not always the case that demographic forces causing population change bear any real and substantial relation to a de jure violation.”<sup>84</sup> Because the de jure violation may, but need not have caused the resegregation, the Court has held that the law need not presume that resegregation is linked to a de jure violation.<sup>85</sup> Further, the Court has suggested that as a “de jure violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior de jure system.”<sup>86</sup> Thus, as time goes on, the Court will employ a stronger presumption that resegregation was not causally connected to a de jure violation and, absent clear evidence to the contrary, will hold that the resegregative patterns are beyond the reach of the law.

As Justice Souter has noted, however, it is inaccurate to believe that residential and school segregation should always be treated as if they are completely independent. Sometimes, “demographic change toward segregated residential patterns is itself caused by past school segregation and the patterns of thinking that segregation creates.”<sup>87</sup> In those cases, the “demographic change is not an independent, supervening cause of racial imbalance in the student body”<sup>88</sup> but, rather, can be traced to the past state-imposed segregation. Further, as Justice Blackmun has noted, “[b]ecause of the various methods for identifying schools by race, even if a school district manages to desegregate student assignments at one point, its failure to remedy the constitutional violation in its entirety may result in resegregation, as neighborhoods

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80. *Id.*

81. *Id.* at 495-96.

82. *Id.* at 496.

83. *Id.* at 495.

84. *Id.* at 496.

85. *See id.*

86. *Id.*

87. *Id.* at 507 (Souter, J., concurring).

88. *Id.* (Souter, J., concurring).

respond to the racially identifiable schools.”<sup>89</sup> Thus, a variety of factors—some directly traceable to actions by the state—may work together to promote resegregation.

Many of the Justices have noted that resegregation in schools and residential patterns are caused by a combination of factors.<sup>90</sup> Justice Scalia explains that racially unbalanced schools are “the product of a blend of public and private actions.”<sup>91</sup> The question then becomes when initial or continuing judicial oversight of desegregation efforts is justified. Justice Scalia has suggested that because so many factors play a role in the segregation or resegregation of schools, “any assessment that they would not be segregated, or would not be as segregated, in the absence of a particular one of those factors is guesswork.”<sup>92</sup> Because this would be mere “guesswork,” he implies that that judicial oversight of continuing desegregation efforts would be inappropriate,<sup>93</sup> absent a clear causal nexus between state action and the racial imbalance.<sup>94</sup> Thus, Justice Scalia seems to want to impose an even higher burden before court-supervised desegregation efforts can be ordered/maintained, since on his view continuing vestiges of state-sponsored segregation may not be enough to justify further desegregation efforts.<sup>95</sup>

One of the points at issue is when the courts are justified in requiring the dismantling of a segregationist system. All on the Court agree that state-sponsored, stigmatizing, racial discrimination cannot be countenanced. As the Court in *Strauder v. West Virginia* recognized over 120 years ago, the Equal Protection Clause includes the right to be free of invidious racial classifications by the state—there is an “exemption from legal discriminations, implying inferiority in civil society [and] lessening the security of [the] enjoyment of the rights

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89. *Id.* at 514 (Blackmun, J., concurring).

90. See notes 84-89 and accompanying text *supra*, and note 91 and accompanying text *infra*.

91. *Freeman*, 503 U.S. at 503 (Scalia, J., concurring).

92. *Id.* (Scalia, J., concurring).

93. *Id.* at 500 (Scalia, J., concurring) (bemoaning that the decision would “have little effect, however, upon the many other school districts throughout the country that are still being supervised by federal judges, since it turns upon the extraordinarily rare circumstance of a finding that no portion of the current racial imbalance is a remnant of prior de jure discrimination.”).

94. See *id.* at 501 (Scalia, J., concurring) (“The Equal Protection Clause reaches only those racial imbalances shown to be intentionally caused by the State.”). See also *Missouri v. Jenkins*, 515 U.S. 70, 101 (1995).

Just as demographic changes independent of de jure segregation will affect the racial composition of student assignments, so too will numerous external factors beyond the control of the KCMSD and the State affect minority student achievement. So long as these external factors are not the result of segregation, they do not figure in the remedial calculus.

*Id.* (citing *Freeman*, 503 U.S. at 494-95).

95. See *Freeman*, 503 U.S. at 500 (worrying that *Freeman* would not do enough to stem desegregation efforts).

which others enjoy.”<sup>96</sup> What does divide the Court is what constitutes state-sponsored, stigmatizing, racial discrimination and what kinds of remedies are constitutionally permissible.

The Court has long recognized that there is an important difference between invidious actions performed by the state rather than by private citizens.<sup>97</sup> As the Court suggested in *McLaurin v. Oklahoma State Regents for Higher Education*,<sup>98</sup> “[t]here is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar.”<sup>99</sup> While the *McLaurin* Court recognized that the “removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices,”<sup>100</sup> it also suggested that it would then at least not be the state that was “depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits.”<sup>101</sup> Thus, the *McLaurin* Court held that the state could not preclude social integration in schools,<sup>102</sup> even if it were true that certain students would not associate with students of other races in any event.

It is worth noting a difference in the *McLaurin* and *Plessy* opinions. In *Plessy*, the Court suggested that the state could not force individuals to associate—“[i]f the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits, and a voluntary consent of individuals”<sup>103</sup>—and refused to strike down a state law forbidding interracial association in railway cars. The *McLaurin* Court also suggested that people could not be forced to associate, but nonetheless struck down a law forbidding interracial association. In *Plessy*, the Court seemed to endorse segregation, while in *McLaurin* the Court seemed to endorse integration but felt constrained in the kinds of remedies that it could impose.

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96. 100 U.S. 303, 308 (1879). By suggesting that racial separation in railway cars did not imply inferiority, see notes 8-9 and accompanying text *supra*, the *Plessy* Court avoided *Strauder*’s dictates.

97. See, e.g., *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding the Fourteenth Amendment applies to state rather than private action).

98. 339 U.S. 637 (1950).

99. *Id.* at 641 (citing *Shelley v. Kraemer*, 334 U.S. 1, 13-14 (1948)). See also *Jenkins*, 515 U.S. at 121 (Thomas, J., concurring) (“The Constitution does not prevent individuals from choosing to live together, to work together, or to send their children to school together, so long as the State does not interfere with their choices on the basis of race.”).

100. *McLaurin*, 339 U.S. at 641.

101. *Id.* at 641-42.

102. In *McLaurin*, the State of Oklahoma had adopted a version of “separate but equal” in which black and white students could attend the same graduate school under certain conditions, but could not interact socially. See *id.* at 640 (“[H]e was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria.”). The Court struck down that state policy. See *id.* at 642.

103. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

Many commentators have concluded that the current Court is no longer committed to desegregating the schools or society more generally.<sup>104</sup> Indeed, because there has been a resegregation in the public schools,<sup>105</sup> which the Court at the very least seems to have countenanced,<sup>106</sup> some have accused the Court of returning to *Plessy* attitudes and commitments.<sup>107</sup>

When the Court held in *Milliken v. Bradley*<sup>108</sup> that busing could not be ordered outside of Detroit's city limits, Justice Marshall warned that the stigmatizing message would not be missed.

Negro students will continue to perceive their schools as segregated educational facilities and this perception will only be increased when whites react to a Detroit-only decree by fleeing to the suburbs to avoid integration. School district lines, however innocently drawn, will surely be perceived as fences to separate the races when, under a Detroit-only decree, white parents withdraw their children from the Detroit city schools and move to the suburbs in order to continue them in all-white schools. The message of this action will not escape the Negro children in the City of Detroit.<sup>109</sup>

More recently, the Court has issued rulings and incorporated language in its decisions whose stigmatizing import is also unlikely to be missed. For example, the Court has implied that integration is a kind of punishment to be imposed rather than a goal of society.<sup>110</sup> Indeed, the Court seems less concerned with promoting a society in which all races are respected and given equal opportunities than it is with punishing

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104. See Nowak, *supra* note 51, at 1112 ("The Gang of Five effectively ended the authority of the federal government to help racial minorities."). See also Mark Strasser, *The Invidiousness of Invidiousness: On the Supreme Court's Affirmative Action Jurisprudence*, 21 HASTINGS CONST. L.Q. 323, 402 (1994) ("The implicit message is that the Court is losing its resolve to promote integration and equality.").

105. See Pamela J. Smith, *Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority*, 6 WM. & MARY J. WOMEN & L. 53, 95 (1999) (discussing "racial resegregation in residential areas and schools").

106. See Fairfax, *supra* note 72, at 48 (discussing the Court's "sanctioning resegregation within school systems and limiting the available remedies.").

107. See *Milliken v. Bradley*, 418 U.S. 717, 761 (1974) (Douglas, J., dissenting) ("So far as equal protection is concerned we are now in a dramatic retreat from the 7-to-1 decision in 1896 that blacks could be segregated in public facilities, provided they received equal treatment."). See also Fairfax, *supra* note 72, at 3 ("In adopting more lax standards and remedies for desegregation cases, the modern Court has adopted reasoning and employed rhetoric similar to that utilized by *Plessy* and its progeny.").

108. 418 U.S. 717 (1974).

109. *Id.* at 804-05 (Marshall, J., dissenting).

110. See John A. Powell & Marguerite L. Spencer, *Remaking the Urban University for the Urban Student: Talking about Race*, 30 CONN. L. REV. 1247, 1268 (1998) ("[O]ne of the reasons the Court refused to allow an interdistrict remedy was the concern for the 'innocent whites.' In effect, the Court told whites that if they could get to the suburbs, they would not be burdened by the full reach of *Brown*."). See also Strasser, *supra* note 104 ("[T]he Court promotes the view that integration is an undesirable burden which will only be placed on individuals who flout the law.").

intentional discriminators.<sup>111</sup>

The Court's equal protection jurisprudence is mechanical. Intentional racial discrimination by the state is constitutionally impermissible, whether it is benign or invidious, and current state systems which are causally linked to such discrimination will also be held constitutionally offensive.<sup>112</sup> The Court seems less concerned about whether the classification at issue is stigmatizing or harmful and more concerned about whether there is a violation in light of its constitutional checklist. Such a jurisprudence is especially poorly equipped to reach a reasonable result if the constitutionality of HBCUs is at issue.

Consider the following description of Historically Black Colleges and Universities.

HBCUs, unlike the racially segregated primary and secondary schools which were defeated in *Brown*, do not impose a stigma on their students that results in a diminished self-perception, thus hindering the learning process. On the contrary, because of their rich legacy and commitment to excellence, HBCUs actually help meliorate the self-perception of their students, creating an environment which nurtures the learning process.<sup>113</sup>

Not only are HBCUs nurturing, but they do not restrict admissions on the basis of race,<sup>114</sup> and thus do not engage in current facial discrimination. Nonetheless, many of those schools were created so that states could maintain a system of segregated higher education,<sup>115</sup> notwithstanding that their purpose has now changed.

Justice Thomas points out, “[d]espite the shameful history of state-enforced segregation, these institutions [HBCUs] have survived and flourished.”<sup>116</sup> He clearly believes that “there exists ‘sound educational justification’ for maintaining historically black colleges as such,”<sup>117</sup> notwithstanding the invidious purposes which they were initially designed to serve.

The Court has made clear that racial classifications creating dual

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111. See Powell & Spencer, *supra* note 110, at 1269 (discussing the Court's having “made racial classification, not racism, the major evil to be eradicated” and viewing “only those who engage in intentional discrimination [as] ‘not innocent’” and appropriately subjected to integration-producing orders).

112. See note 82 and accompanying text *supra*.

113. Adams, Jr., *supra* note 61, at 497.

114. See Powell & Spencer, *supra* note 110, at 1261 (“HBCUs have always been open to all students.”); Leland Ware, *The Most Visible Vestiges: Black Colleges after Fordice*, 35 B.C. L. REV. 633, 674 (1994) (“Unlike white colleges, black colleges have never engaged in race-exclusive admission practices.”).

115. See Ware, *supra* note 114, at 636 (discussing the Second Morrill Act, which “required that states either provide separate educational facilities for black students or admit them to existing colleges. In response, all of the Southern and border states chose to establish separate schools for black students.”).

116. *United States v. Fordice*, 505 U.S. 717, 748 (1992) (Thomas, J., concurring).

117. *Id.*

systems of education are unconstitutional,<sup>118</sup> although de facto resegregation may not violate any constitutional guarantees.<sup>119</sup> The Court's focus is on what the state has done and continues to do. "That an institution is predominantly white or black does not in itself make out a constitutional violation,"<sup>120</sup> although "whether existing racial identifiability is attributable to the State"<sup>121</sup> is constitutionally significant.<sup>122</sup>

In *United States v. Fordice*,<sup>123</sup> the Court suggested that the HBCUs at issue were being maintained by the State of Mississippi to perpetuate past invidious practices.<sup>124</sup> For other states to avoid the charge that their publicly funded HBCUs are being used to promote invidious purposes, they may have to redefine the mission of the HBCUs;<sup>125</sup> else, unnecessary duplication of programs at HBCUs might be thought an attempt by the state to promote invidious segregation policies of the past.<sup>126</sup> Ironically, this forced reclassification might act to limit the potential of the HBCU.<sup>127</sup> Further, even with such a reclassification, the schools may nonetheless be found to violate constitutional guarantees.<sup>128</sup>

Justice Thomas suggested in his *Fordice* concurrence that because the Court's decision "does not compel the elimination of all observed racial imbalance, it portends neither the destruction of historically black colleges nor the severing of those institutions from their distinctive histories and traditions."<sup>129</sup> That may be so, although the opinion's

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118. See *Milliken v. Bradley*, 418 U.S. 717, 737 (1974) ("The target of the *Brown* holding was clear and forthright: the elimination of state-mandated or deliberately maintained dual school systems with certain schools for Negro pupils and others for white pupils.").

119. See *Smith*, *supra* note 61, at 2011 ("[A]ccording to the Court, de facto segregation, or resegregation resulting from white flight or African-American concentration, does not violate the Constitution or impinge on *Brown* and its progeny. Only segregation imposed by a governmental entity warrants constitutional scrutiny and remedy.").

120. *Fordice*, 505 U.S. at 743.

121. *Id.* at 728.

122. See John A. Moore, Note, *Are State-Supported Historically Black Colleges and Universities Justifiable after Fordice?—A Higher Education Dilemma*, 27 FLA. ST. U.L. REV. 547, 556 (2000) (The *Fordice* Court "implied that by maintaining a racially identifiable university, a state walks a narrow line that borders on unconstitutionality.").

123. 505 U.S. 717 (1992).

124. See *id.* at 733 ("[T]here are several surviving aspects of the Mississippi's prior dual system which are constitutionally suspect; for even though such policies may be race neutral on their face, they substantially restrict a person's choice of which institution to enter, and they contribute to the racial identifiability of the eight public universities.").

125. See Moore, *supra* note 122, at 566 ("After *Fordice*, however, the Florida Board of Regents restructured Florida's university system to that FAMU now offers different educational programs and has a different mission than FSU.").

126. See *Fordice*, 505 U.S. at 738.

127. See Moore, *supra* note 122, at 566 ("[P]ublic HBCUs operating within a tier/mission classification will never have the opportunity to compete with their predominately white counterpart because the public HBCU and the majority institution will, by virtue of the tier system itself, never be similarly classified.").

128. See *Fordice*, 505 U.S. at 742 ("Though certainly closure of one or more institutions would decrease the discriminatory effects of the present system, based on the present record we are unable to say whether such action is constitutionally required.") (citation omitted).

129. *Id.* at 745 (Thomas, J., concurring).

language is ominous.<sup>130</sup> For example, the Court suggested that race-neutral policies which contributed to the “racial identifiability”<sup>131</sup> of the university would have to be justified or eliminated,<sup>132</sup> which might mean that some of the features making it most attractive to minorities would be subject to close scrutiny precisely because they were so effective. Further, Justice O’Connor suggested in her concurrence that if the state’s “legitimate educational objectives [could be accomplished] through less segregative means,”<sup>133</sup> then the policy or practice at issue might be constitutionally vulnerable. She did not specify which programs would be examined in light of this criterion, but it is not hard to imagine that the Court using strict scrutiny might find that a variety of legitimate objectives might be accomplished in other, “less segregative” ways. Justice O’Connor also suggested that “if the State shows that maintenance of certain remnants of its prior system is essential to accomplish its legitimate goals, then it still must prove that it has counteracted and minimized the segregative impact of such policies to the extent possible.”<sup>134</sup> She at least would impose very severe burdens on a state insofar as it wished to maintain such a system, since “[o]nly by eliminating a remnant that unnecessarily continues to foster segregation or by negating insofar as possible its segregative impact can the State satisfy its constitutional obligation to dismantle the discriminatory system that should, by now, be only a distant memory.”<sup>135</sup> Thus, legitimate goals notwithstanding, schools might have to work very hard indeed to meet the standard as Justice O’Connor understands it.

Justice Thomas was correct when suggesting that a “challenged policy does not survive under the [*Fordice*] standard . . . if it began during the prior de jure era, produces adverse impacts, and persists without sound educational justification.”<sup>136</sup> The question at hand, however, is when the Court will say that a HBCU passes constitutional muster. For example, suppose that a school began during the prior de jure era, has a sound educational justification, and produces both beneficial and adverse impacts.<sup>137</sup> It is not at all clear that the school would meet the current standard suggested by some members of the

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130. See Powell & Spencer, *supra* note 110, at 1261-62 (“In 1992, in *United States v. Fordice*, the Supreme Court ruled that practices traceable to the old system of segregation in Mississippi needed to be justified or eradicated. The most obvious outgrowths of the segregated system are the black public colleges and universities. Nothing in the ruling ensures the continuing existence of these accessible institutions.”).

131. *Fordice*, 505 U.S. at 733.

132. See *id.*

133. *Id.* at 744 (O’Connor, J., concurring).

134. *Id.* (O’Connor, J., concurring).

135. *Id.* at 744-45 (O’Connor, J., concurring).

136. *Id.* at 746 (Thomas, J., concurring).

137. See, e.g., Justice O’Connor would presumably suggest that the system would have adverse impacts unless it had the least segregative impact practicable.

Court.

Claiming that the *Fordice* test might result in the elimination of HBCUs,<sup>138</sup> Justice Scalia suggests that a better test is that as long as qualified students can attend whatever school they choose, the Constitution's requirement will have been met.<sup>139</sup> Yet, Justice Scalia's test is too lax. Although a State could not "clos[e] particular institutions, historically white or historically black, to particular racial groups,"<sup>140</sup> it is not clear what in addition would be required in order for the state system to pass constitutional muster. For example, under Justice Scalia's test, Mississippi would not have been acting unconstitutionally even if in fact it had been effectively continuing its past segregation policies, as long as it had not expressly precluded students from attending any of its schools on the basis of race.

It is clear that the Court does not believe that Justice Scalia's test would satisfy constitutional requirements. Indeed, if HBCUs are seen as not having "minimized the segregative impact of . . . [its] policies to the extent possible,"<sup>141</sup> then at least some on the Court will look at them with a jaundiced eye.

In her concurrence in *Missouri v. Jenkins*,<sup>142</sup> Justice O'Connor explained that it "is only by applying strict scrutiny that we can distinguish between unconstitutional discrimination and narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination."<sup>143</sup> In his *Jenkins* concurrence, Justice Thomas suggested that at the "heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups. It is for this reason that we must subject all racial classifications to the strictest of scrutiny."<sup>144</sup> Both believe that racial classifications by the state must be subjected to extremely close scrutiny.

The difficulty pointed to here is that if indeed HBCUs are thought to be vestiges of past attempts to segregate, then the Court will likely subject them to the strictest of scrutiny. It will not suffice to point out that "the existence of one-race schools is not by itself an indication that the State is practicing segregation,"<sup>145</sup> because the Court will consider

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138. *Fordice*, 505 U.S. at 760 (Scalia, J., concurring in the judgment in part and dissenting in part) ("What the Court's test is designed to achieve is the elimination of predominantly black institutions.").

139. See *id.* at 754-55 (Scalia, J., concurring in the judgment in part and dissenting in part).

140. *Id.* at 748 (Thomas, J., concurring).

141. *Id.* at 744 (O'Connor, J., concurring).

142. 515 U.S. 70 (1995).

143. *Id.* at 112 (O'Connor, J., concurring).

144. *Id.* at 120-21 (Thomas, J., concurring).

145. *Id.* at 116 (Thomas, J., concurring).

the racial imbalance in light of the historical genesis of those schools. Further it likely will not even suffice to establish that HBCUs are non-stigmatizing, use sound educational practices, and have a “firmly established track record of successfully educating black students”<sup>146</sup> if indeed the Court will be examining their constitutionality with the strictest of scrutiny.

Consider the kind of test the Court has employed in other race-conscious contexts. In *Richmond v. J. A. Croson Co.*,<sup>147</sup> the plurality suggested, “[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”<sup>148</sup> To suggest that black students will “learn as well [or even better] when surrounded by members of their own race as when they are in an integrated environment”<sup>149</sup> would likely not suffice to make HBCUs immune from constitutional challenge, because the Court would require an extra, special, remedial justification. Benevolent motivations and legitimate goals and effects would not suffice, just as they have not sufficed in other race-conscious contexts.<sup>150</sup> Indeed, if the Court uses the kind of scrutiny that it has in other race-related matters, it is hard to imagine what would have to be shown for the Court to uphold the constitutionality of HBCUs.

#### IV. CONCLUSION

In “The Civil Rights Chronicles,”<sup>151</sup> Derrick Bell offered an allegory—“The Chronicle of the Slave Scrolls.”<sup>152</sup> That chronicle described the discovery of scrolls detailing the history of slavery in America.<sup>153</sup> Blacks thrived after studying their history. However, the success of the black community caused fear and jealousy in the white community.<sup>154</sup> “Racial Toleration Laws” were passed which prohibited the teaching of the slave scrolls,<sup>155</sup> thereby solving the “problem” of black success.

Suppose that the Court were to hold that HBCUs did not pass

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146. *Ware*, *supra* note 114, at 676 (1994).

147. 488 U.S. 469 (1989) (plurality opinion).

148. *Id.* at 493.

149. *Jenkins*, 515 U.S. at 122 (Thomas, J., concurring).

150. *See, e.g.*, *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (holding a federal minority set-aside program subject to strict scrutiny); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding a minority set-aside program unconstitutional); *Wygant v. Jackson Bd. Of Educ.* 476 U.S. 267 (1986) (striking down a program protecting minorities against layoffs).

151. Derrick Bell, *The Supreme Court, 1984 Term Forward, The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).

152. *Id.* at 68-71.

153. *See id.* at 69.

154. *See id.* at 70-71.

155. *Id.* at 71.

constitutional muster because they were a vestige of past discrimination. Commentators would suggest that the Court was engaging in the kind of activity that Derrick Bell predicted would occur when he wrote "The Civil Rights Chronicles" in the mid-eighties, namely, that in the name of "toleration" and "acceptance," the Court (or State) would adopt a policy which would harm minority interests while claiming to promote them.

The point here is not that the Court should instead adopt Justice Scalia's approach, which might allow states to promote the kinds of invidious policies and practices that existed pre-*Brown* as long as the states were willing not to be extremely obvious in what they were doing. On the contrary, adoption of Justice Scalia's approach would be going too far in the other direction and would also likely promote racial disharmony in this country. Indeed, it should be noted that were the Court to uphold the constitutionality of HBCUs, even without adopting Justice Scalia's approach, it would likely engender criticism.

In a series of decisions,<sup>156</sup> the Court has manifested a growing unwillingness to countenance policies that promote minority interests. By refusing to recognize that "profound difference[s] separate . . . governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism,"<sup>157</sup> the Court has undermined its own credibility on racial matters.<sup>158</sup> It seems likely that were the Court to uphold the constitutionality of HBCUs without at the same time modifying its equal protection jurisprudence, commentators would suggest that the Court was once again promoting racial division and separation rather than unity and respect. Thus, by upholding the constitutionality of HBCUs but striking down programs designed to assure adequate minority representation in other colleges and universities,<sup>159</sup> the Court

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156. See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200 (1995); *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Milliken v. Bradley*, 418 U.S. 717 (1974).

157. *Richmond*, 488 U.S. at 551-52 (Marshall, J., dissenting).

158. See K.G. Jan Pillai, *Phantom of the Strict Scrutiny*, 31 NEW ENG. L. REV. 397, 468 (1997) (discussing "the erosion of the confidence of minorities and a significant number of constitutional scholars in the integrity and impartiality of the Supreme Court in making race-conscious decisions—a condition that is not conducive to the long-term interests of the judiciary and the rule of law"). See also Strasser, *supra* note 104, at 403 ("The Court's alternating presumptions concerning intentional discrimination and emphasis on 'victim's' perceptions cannot help but promote the view that the Court does not want to rectify past injustice or even extirpate inappropriate views about race, but rather wants to maintain the status quo or, perhaps, the status quo of a bygone era.").

159. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Subsequent decisions in the lower federal courts have suggested that race may not even be considered a factor in college admissions, see *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), and that minority scholarship programs may offend equal protection guarantees. See *Podberesky v. Kirwan*, 38 F.2d 147 (4th Cir. 1994).

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*Plessy, Brown, and HBCUs*

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would be accused of attempting to promote further racial separation in higher education.

*Plessy* upheld racial segregation in railway cars, refusing to recognize the stigmatization that such a law entailed. *Brown* took account of both the social meaning of segregation and empirical data suggesting that state-imposed segregation caused real and lasting harms. The current Court has adopted a mechanical approach to race-conscious remedies, which seems both to prevent the state from ameliorating the effects of past discrimination and also to allow if not encourage private actors to continue to discriminate. This attitude has led to a distrust of the Court, which will make any of its decisions on racial matters subject to close public scrutiny.

It is by no means clear what the Court will do if presented with a case in which the constitutionality of HBCUs is squarely presented. While there is reason to be optimistic that their existence would be upheld, there is less reason to believe that the Court will understand that its whole jurisprudence in matters of race is in need of correction. Until the Court understands that a more nuanced approach on racial matters must be adopted, the Court will continue to promote racial dissension and disunion in this country, even if it happens upon the right result on particular occasions.